86-1005 (1)

No. ___________

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1986

THE SOMMERS DRUG STORES COMPANY EMPLOYEE PROFIT SHARING TRUST,

Cross-Petitioner

v.

WALTER N. CORRIGAN AND CORRIGAN ENTERPRISES, INC.,

Cross-Respondents

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHARLES B. GORHAM
SHADDOX, COMPERE, GORHAM & GOOD, P.C.
1250 N.E. Loop 410, Suite 725
San Antonio, Texas 78209
(512) 822-2018
COUNSEL OF RECORD

CHARLES R. SHADDOX
STEPHEN E. WALRAVEN
SHADDOX, COMPERE, GORHAM & GOOD, P.C.
1250 N.E. Loop 410, Suite 725
San Antonio, Texas 78209
(512) 822-2018
COUNSEL FOR CROSS-PETITIONER

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Questions Presented

1. Whether the District Court properly instructed the jury on Cross-Respondents' status as fiduciaries under the Employee Retirement Income Security Act of 1974.

2. Whether punitive damages may be recovered under Section 502(a)(2) and Section 502(a)(3) of the Employee Retirement Income Security Act of 1974.

3. Whether the Court of Appeals properly exercised its appellate jurisdiction in ruling that the testimony of the Cross-Petitioner's expert witness was unworthy of credit and that there was insufficient evidence to support the jury's finding on fair market value.

List of Parties

The parties to the proceeding in the Court of Appeals were the Cross-Petitioner, The Sommers Drug Stores Company Employee Profit Sharing Trust, and the Cross-Respondents, Walter N. Corrigan and Corrigan Enterprises, Inc.

This action was instituted in the District Court by three named former employees acting as beneficiaries on behalf of the employee benefit plan: Eva Louise Taylor, Ruth M. Kalinoski, and Hannelore I. Hill.

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Cross-Respondents

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Cross-Petitioner, The Sommers Drug Stores Company Employee Profit Sharing Trust, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on July 14, 1986.

Opinion Below

The opinion of the Court of Appeals for the Fifth Circuit is reported at 793 F.2d 1456.

The United States District Court for the Western District of Texas (Garcia, D. J.) did not write an opinion.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 14, 1986. On August 18, 1986, the Fifth Circuit denied petitions for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This is a cross-petition filed pursuant to Rule 19.5. The Cross-Respondents' petition for certiorari was filed in this Court on November 14, 1986, and was received by cross-petitioner's counsel on November 19, 1986. This cross-petition is being filed not more than 30 days thereafter.

Statutes Involved

Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A):

Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B).

Section 409(a) of ERISA, 29 U.S.C. § 1109(a):

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by

the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

Sections 502(a)(2) and (a)(3) of ERISA, 29 U.S.C. §§ 1132(a)(2) and (a)(3):

A civil action may be brought —

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

Statement of the Case

This suit was filed on October 9, 1980, by Joseph Baller and members of his family on behalf of themselves and the class of shareholders of Corrigan Enterprises, Incorporated, and by Eva Louise Taylor, Ruth M. Kalinoski, and Hannelore I. Hill on behalf of themselves and the class of beneficiaries of the Sommers Drug Stores Company Employee Profit Sharing Trust. (R 1.) Plaintiffs sought relief against Defendants Walter N. Corrigan ("Corrigan") and Corrigan Enterprises, Incorporated, previously known as The Sommers Drug Stores Company ("Sommers"). Plaintiffs alleged violations of state and federal securities laws and of the Employee Retirement Income Security Act of 1974 ("ERISA").

On May 19, 1982, Defendants filed their "Motion for Decertification of Class or Division of Shareholder Class into Subclasses." (R 107.) The District Court in its order of March 16, 1983, ruled that the numerosity requirement had not been satisfied, decertified the class of shareholders, and ordered that the

Trust suit proceed separately under its own cause number and style: "Employee Profit Sharing Trust v. Corrigan Enterprises, Incorporated and Walter N. Corrigan." (R 121.)

Plaintiff, The Sommers Drug Stores Company Employee Profit Sharing Trust (the "Trust"), filed on April 6, 1983, its motion for leave to file its Second Amended Complaint in compliance with the District Court's order. (R 122, 123.) In this complaint, Plaintiff asserted claims for securities law violations, ERISA violations, and breach of state law fiduciary duty.

This case was tried before a jury from March 19, 1985, to March 29, 1985. During the trial, the District Court permitted Plaintiff to file its Fourth Amended Complaint, eliminating all but the ERISA and state law fiduciary duty counts. (R 208.) The District Court granted Defendants' motion to dismiss Plaintiff's state law fiduciary claim on the grounds that it had been preempted by ERISA. (R 210.)

On March 28, 1985, both sides made objections to the charge which were overruled by the District Court. (Tr. 963-69.) There followed closing arguments (Tr. 969-1027) and the reading of the District Court's charge. (Tr. 1027-37.)

The jury concluded its deliberations on March 29, 1985, and returned a verdict favorable to Plaintiff. (R 220.)

The District Court entered judgment on April 4, 1985. (R 224.) The District Court also awarded Plaintiff an attorneys' fee of $218,967.26. (R 250.) On May 28, 1985, a Second Amended Judgment for Plaintiff was entered making minor changes to the prior judgment. (R 263.) That judgment was amended by order dated August 22, 1985, granting prejudgment interest at the rate of 10% per annum. (R 278.) It is from the Second Amended Judgment as modified by the District Court's order of August 22, 1985, that the parties appeal.

Corrigan Enterprises, Incorporated, the corporate Cross-Respondent in this appeal, filed its articles of incorporation in 1947 with the state of Maryland under the name "The Sommers Drug Stores Company." (PX 4.) It changed its name to

Corrigan Enterprises, Incorporated on February 16, 1978. (PX 26.) Because most of the transactions leading to the filing of this suit occurred prior to that date, it will be referred to herein as "Sommers."

By 1977, Sommers operated 40 drug stores in San Antonio, Austin and Beaumont, Texas (Tr. 180) and owned all of the stock of a subsidiary corporation, Crockett Realty Company. Crockett Realty owned three tracts of real estate: Sommers' main office and warehouse facility on East Houston Street, a residential estate on Gembler Road (PX 114-16), and a coast house in Port Aransas, Texas. (Tr. 226.)

Corrigan, the individual defendant, married Virginia Bridgers, whose family owned Sommers stock. (Tr. 181.) He became an employee of the corporation in 1947 (Tr. 178) and was elected president by 1956 (Tr. 178) at which time he also began serving as a member of the board of directors. (Tr. 209-12.)

Corrigan received special benefits because of his position. He was given stock options (Tr. 181) and substantial bonuses (Tr. 181-82; Px 53, page 3), borrowed substantial sums from Sommers on an interest-free basis (Tr. 182; PX 57), and was permitted the use of a company automobile (Tr. 190-91) and the Port Aransas beach house. (Tr. 191.) He was also permitted to reside in the Gembler Road house, known as "the castle" for a nominal rent. (Tr. 121, 189.)

During the period of Corrigan's employment, he became the controlling shareholder of the corporation. (Tr. 193.) By June 10, 1977, Corrigan owned 28,800 of the 61,524[1] shares of the corporation's one dollar par value common stock. (PX 87, pages 3 and 8.) The second largest shareholder as of that date was The Sommers Drug Stores Company Employee Profit Sharing Trust which owned 10,000 shares. (PX 87, page 8.)

Sommers adopted The Sommers Drug Stores Company Employee Profit Sharing Plan (the "Plan") and the Sommers Drug Stores Company Employee Profit Sharing Trust (the

[1] A trust benefiting Corrigan's children owned 4,000 shares. (PX 20, page 2.)

"Trust") in 1956. (PX 7, page 3.) The Plan and Trust were amended on September 29, 1976, following enactment of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1011, *et seq.* (1975). (PX 7, page 45.) The Plan and Trust together constituted an "employee benefit plan" as that phrase is defined by ERISA § 3(3). Corrigan served as a Trustee of the Trust until May 27, 1976. Thereafter he regularly attended the meetings of the board of trustees. (PX 38-41.) On January 1, 1978, he resumed the office of trustee. (PX 8, page 1.)

Corrigan began entertaining offers for the sale of Sommers as early as 1972 (Tr. 212) and over the years discussed a sale with every major drug company in the United States. (Tr. 195-96.) Corrigan believed that if such a sale were made, he would be entitled to a premium for his controlling block of stock. (Tr. 197.) He wanted $2,800,000 plus the assets in Crockett Realty for his stock. (Tr. 498.) Dogged adherence to the belief that he was entitled to a premium directed Corrigan's future course.

An offer to purchase Sommers was made by Revco D.S. Incorporated. On December 15, 1976, Glenn Golenberg, on behalf of Revco, offered to purchase all of Sommers' stock for a total consideration of $4,000,000. (PX 2 and 3; Tr. 394-96.) Corrigan had previously stated that he was unwilling to accept such an offer unless the proceeds of the sale could be distributed disproportionately and unless he were given an option to buy the corporation's real estate at its book value. (PX 2 and 3; Tr. 176 and 398-400.) Revco responded that a disproportionate sale was acceptable to it only upon receipt of "documentation as to the legality of such a transaction." (PX 3.) This sale was not consummated.

The next company to express an interest in Sommers was Malone & Hyde, Inc. Claiborne Gregory, legal counsel for Sommers and Corrigan (Tr. 365-67), rejected a plan whereby all of the shareholders would be paid $40.00 per share and Corrigan would receive additional consideration totalling $2,115,000 in the form of a consultation agreement, an agreement not to compete, an option, and deferred compensation. (PX 77.) Gregory stated

that: "Mr. Corrigan simply cannot live with these tax results." (PX 77, page 1.)

Gregory proposed as an alternative a two-stage transaction whereby Corrigan would receive an option to sell his shares for $116.2493 per share and an option to buy the property owned by Crockett Realty for $600,000, a price substantially below its fair market value. (PX 77, page 4; PX 108-10.) The other shareholders would tender their stock at $40.00 per share. (PX 77, page 1.) Like Revco, Malone & Hyde requested indemnification of any suits that might arise out of this disproportionate transaction. (Tr. 263-64, 500-01.) Because of Malone & Hyde's doubts as to the legality of such a distribution, the transaction was never carried out. (Tr. 501.)

The legal problems that Corrigan had confronted in his attempt to obtain a disproportionate share of the sales proceeds caused him to enlist Gregory's firm to devise a plan to reduce the number of minority shareholders. (Tr. 199-201, 501; PX 70, page 2.) The plan, which was presented to the shareholders on June 10, 1977, called for the shareholders to exchange their $1.00 par value common stock for $250.00 par value common stock at an exchange ratio of 250 to 1. (PX 19-21.) Multiples of fewer than 250 shares would be redeemed at $40.00 per share. This plan was approved (PX 23) and, as a consequence, the number of shareholders was reduced from 66 to 16. (PX 87; Tr. 206.)

Negotiations with Malone & Hyde forged ahead and on July 7, 1977, the parties agreed to a sale of all of the corporation's operating assets. (PX 27.) Additional consideration flowed to Corrigan in the form of a $1,000,000 consulting agreement which admittedly did not require any regular services. (Tr. 227-28.) When the sale was closed, Sommers received cash in the amount of $5,490,834.69 (PX 36) and was still subject to indebtedness of $2,376,018. (PX 88, page 3.) It continued to own, through Crockett Realty, the Houston Street property where the corporation had maintained its main offices, the Gembler Road property which had served as Corrigan's residence, and the house and lot in Port Aransas, Texas. (PX 226.) James Holmes, the corporation's executive vice-president, testified that he had computed the

Trust's share of the assets after the sale to be more than $1,300,000. (Tr. 514.)

Carl Nentwich, a real estate appraiser called by the Trust, using a September 1, 1977 appraisal date, appraised the Houston Street property at $1,040,000 (PX 109), the Gembler Road property at $1,080,000 (PX 108), and the Port Aransas property at $43,200. (PX 110.)

Corrigan knew that Sommers' neighbor, Coca-Cola Bottling Company of San Antonio, had a special need for the East Houston Street property. (Tr. 237.) It had run out of space at its facility and had offered to buy part of the land. (Tr. 500.) Corrigan knew that someday Coca-Cola would want it all (Tr. 500) and would pay a premium to get it. During negotiations with Coca-Cola, he demanded $2,700,000 for the property. (PX 120.) Corrigan's judgment was borne out and on July 28, 1980, Sommers sold the East Houston Street property for $2,550,000, more than twice its appraised value. (Tr. 707-08; PX 15.)

Immediately following the 250 to 1 recapitalization, Corrigan began approaching all of Sommers' shareholders with an offer for Sommers to buy their $250 par value common stock for $10,000 per share. (Tr. 373.)[2] By March 6, 1978, there were only 197 shares outstanding. (Tr. 231, 502.)

The Trust was also to be paid $400,000 for its 40 shares. (PX 52, page 3.) James R. Holmes, in a letter dated September 23, 1977, objected to the purchase of the Trust's shares, raising doubt as to the adequacy of consideration. (PX 34.) Although Holmes' letter put the adequacy of Corrigan's offer in dispute, the Trustees did not employ appraisers, business consultants, independent counsel[3], or any expert to assist them in considering

[2]$10,000 per share for each of the Sommers $250 par value common shares is equivalent to $40 per share for each of the $1.00 par value common shares which had previously been called in upon approval of the plan of recapitalization.

[3]In the past, the law firm of Gresham, Davis, Gregory, Worthy and Moore had represented Sommers, Corrigan and the Trust. On November 3, 1977, Mr. Gregory informed the trustees that his firm could

Corrigan's offer. (Tr. 686-87, 692-93, 695.) In fact, they did not take any action to determine the value of the Sommers stock. (Tr. 698.)

Corrigan wrote to Dana Gold, chairman of the board of trustees, on December 15, 1977. (PX 10.) This letter in part stated:

> This letter is written to confirm certain facts and to suggest a course of conduct, with reference to the above named Trust, which, hopefully, can result in distribution payments, as promptly as possible, to the beneficiaries of the said Trust.
>
> As you and the beneficiaries know, The Sommers Drug Stores Company (Sommers) has sold all of its drug store operations and has terminated relationships with all of its employees (except Mrs. Gavlick and me) effective August 22, 1977, when Malone & Hyde, Inc., the purchasers, took over. Under these circumstances, the Sommers Board of Directors (the Board) has determined that no further contributions will be made to the Profit Sharing Trust on behalf of the terminated employees and the Board has also expressed its desire that the assets of the Trust should be reduced to cash, and that a distribution then be made to the beneficiaries of all of the trust assets.
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> . . . If responses favoring sale of the stock to Sommers are received from a satisfactory number of beneficiaries (and by this I mean satisfactory to me and satisfactory to the Trustees) then Sommers will again offer the $400,000 amount for the stock. If a sale

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not represent the Trust in connection with Sommers' offer to buy the Sommers stock owned by the Trust. On that date, Joe Beard, a member of that firm, was serving as plan administrator. (PX 44.)

of the stock is thus effected, so that the assets of the Trust are reduced to cash, I will ask the Board to take appropriate action to bring about the distribution of the assets of the Trust to all beneficiaries under the Profit Sharing Trust. As you know, the power to terminate the Trust and to make distribution of its assets to the beneficiaries rests exclusively in the Board of Directors of Sommers, and not in the Trustees. However, the Trustees have the exclusive power, and exclusive duty, to decide whether or not to buy or sell assets of the trust, including the exclusive authority to determine whether or not to sell the Sommers stock to Sommers for $400,000.

. . . On the other hand, you may decide to hold the stock; and in that event you should know that although further business activities of Sommers are not fully defined at this time it is my present and long range objective to pursue business ventures which have prospects for long term appreciation, rather than immediate high income yield.

. . . Looking to the future, someday the Sommers stock could be worth a good deal more than at present, or a good deal less, depending on the success of future investments and future operations.

(PX 10.)

At Corrigan's request, Gold called a meeting of the beneficiaries for the next day. (Tr. 276.) At the meeting, Corrigan restated the position outlined in his letter and invited the beneficiaries to approve his offer. (Tr. 276.) Corrigan gave the beneficiaries two choices: take it or leave it. (Tr. 690-91.) Fearing for the safety of their investment, and without the benefit of independent advice, the beneficiaries voted for the proposition. (Tr. 281.)

On March 6, 1978, the Trust sold its stock to Sommers for $400,000. (PX 4.) As of that date, Corrigan, a trust benefiting Corrigan's children, and The Sommers Drug Stores Employee

Profit Sharing Trust were the only shareholders of the corporation. (Tr. 231.) Its directors were Corrigan, his son, Walter Corrigan, II, his daughter, Anne Horn, and his secretary, Bonnie Gavlick. (PX 56; Tr. 245-46.) The trustees of the Trust were Corrigan and his secretary, Mrs. Gavlick. (PX 8, page 1.) Beginning March 15, 1978, checks were distributed to the beneficiaries liquidating their account balances in the Trust. (DX G.)

Reasons for Granting the Writ

I.

The Fifth Circuit's holding that the District Court improperly instructed the jury on Cross-Respondents' status as fiduciaries presents an important federal question with significant impact on the enforcement of the fiduciary duties imposed by the Employee Retirement Income Security Act of 1974.

Sections 404, 405 and 406 of ERISA, 29 U.S.C. §§ 1104, 1105 and 1106, require fiduciaries of employee benefit plans to discharge their duties solely in the interest of the participants and beneficiaries, to prevent breaches of fiduciary duty by other fiduciaries, and to prevent prohibited transactions. These duties are only imposed on fiduciaries, a term defined by ERISA § 3(21)(A):

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

A person is a fiduciary under the statute to the extent he exercises discretionary authority or discretionary control over the plan or its assets. Although a person may have discretionary authority or discretionary control over some plan functions but not over others, if he has *any* discretionary authority or discretionary control, he will be a fiduciary within the meaning of the statute. But even though a person is a fiduciary, his liability under ERISA for breach of fiduciary duty will extend only to those plan functions over which he exercises discretion. Thus, Section 3(21)(A) performs the two-fold function of defining the minimal requirements for fiduciary status and limiting liability for breach of fiduciary duty to those plan functions over which the fiduciary has discretion.

The distinction between fiduciary status and fiduciary liability is illustrated in *Brandt v. Grounds*, 687 F.2d 895 (7th Cir. 1982) where the Court held that a bank was a fiduciary to the extent it offered investment advice to the trust. It was not, however, a fiduciary in the performance of its functions as depository because it had no discretion in the performance of those functions. "[W]e conclude that the Bank was not acting as a fiduciary to the Trust when it performed its depository function in the withdrawal transactions. Thus, liability under [Section 409(a)] could not exist for those actions." 687 F.2d at 898.

Another example of this distinction is found in *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323 (9th Cir. 1985). There the employer appointed a plan administrator. The administrator delegated the authority to review denied claims to a committee. An employee whose claim was denied brought suit under ERISA against the employer and the administrator. The Ninth Circuit held that even though the employer and the members of its board of directors were fiduciaries with respect to the selection of the plan administrator, they were only liable for breaches of fidiciary duty with respect to the selection and retention of the administrator. 761 F.2d at 1325.

Liability for breach of fiduciary duty in the selection of plan administrators was discussed in *Leigh v. Engle*, 727 F.2d 113 (7th Cir. 1984). There the defendants controlled the employer

through stock ownership thereby permitting them to appoint and remove all of the employer's directors. The directors in turn had the power to remove the trust administrators. The Court held that the defendants were fiduciaries to the extent that they performed fiduciary functions in selecting and retaining plan administrators even though their power to do so was indirect. 727 F.2d at 133. The Court then held that although the defendants did not exercise discretionary authority or discretionary control over the trust's investments, they were fiduciaries to the extent they selected and retained the plan administrators responsible for the trust's investments and had a duty to monitor the administrators' actions. "[The defendants] could not abdicate their duties under ERISA merely through the device of giving their lieutenants primary responsiblity for the day-to-day management of the trust. [The defendants] were obliged to act with an appropriate prudence and reasonableness in overseeing [the administrators'] management of the [trust]." 727 F.2d at 135.

In summary, it can be said that any person who exercises discretionary authority or discretionary control over the management of a plan or its assets is a fiduciary, but his liability for breach of duty is limited to those plan functions over which he has discretion. If a person is a fiduciary under Section 3(21)(A) he will be liable under Section 404 only to the extent there is a breach of any of the fiduciary duties with respect to which he has discretionary authority or discretionary control. That limitation is inapplicable, however, to liability under Sections 405 and 406. Under Section 405, every fiduciary is liable for the breaches of his co-fiduciaries to the extent of his knowledge even though he had no discretionary authority or discretionary control over the plan functions in question. And, under Section 406, every fiduciary is liable if he causes the plan to engage in a prohibited transaction even though his discretionary authority and discretionary control is minimal.

A person may be liable for breach of co-fiduciary duty under Section 405 or for engaging in a prohibited transaction under Section 406 even though he himself did not breach his fiduciary

duty under Section 404. This possiblity is recognized in the Labor Department Regulations:

> For example, the board of directors may be responsible for the selection and retention of plan fiduciaries. In such case, members of the board of directors exercise "discretionary authority and discretionary control respecting management of such plan" and are, therefore, fiduciaries with respect to the plan. However, their responsibility, and consequently, their liability, is limited to the selection and retention of fiduciaries *(apart from co-fiduciary liability arising under circumstances described in Section 405(a) of the Act)*. [Emphasis added.]

ERISA Interpretive Bulletin 75-8, 29 C.F.R. § 2509.75-8 (1983).

Co-fiduciary liability under Section 405 without accompanying fiduciary duty under Section 404 was also recognized in *Leigh v. Engle, supra* at 135: "The fact that [the defendants] had only limited fiduciary responsibilities does not mean that they had no responsibility whatever. As fiduciaries responsible for selecting and retaining their close business associates as plan administrators, the [defendants] had the duty to monitor appropriately the administrator's actions. 29 U.S.C. §§ 1104(a)(1), *1105(a)* and *1105(c)*." [Emphasis added.] Later the Court stated: "The question thus becomes whether [the defendants] fulfilled their duties under section 404 *and section 405* in light of their knowledge that the [administrators] who managed the trust assets faced conflicting loyalties with respect to those investments." 727 F.2d at 135. [Emphasis added.]

Walter Corrigan was a co-trustee of the Trust on March 6, 1978, the date the Trust sold its stock to Sommers. (PX 8, page 1.) The Court of Appeals, however, refused to take cognizance of that fact. It held that because this fact was not referenced in the District Court's instruction or argued by the Trust in its closing argument, it was waived on appeal. This novel holding is unsupported by any authority. Plaintiff's Exhibit 8 was admitted

into evidence without objection. The exhibit expressly states that Corrigan became a co-trustee of the Trust on January 1, 1978, two months and six days before the Trust sold its stock. The jury was entitled to consider that fact together with any other facts appearing in the record. That fact alone is sufficient to support the jury's finding that as of March 6, 1978, Walter Corrigan exercised discretionary authority and discretionary control.

Sommers and Corrigan were also fiduciaries by reason of other powers and controls over which they exercised discretion. Sommers, acting through its board of directors, appointed and removed plan administrators (PX 7, page II-1) and trustees (PX 7, page III-1) and had the power to amend the plan documents, discontinue plan contributions, and terminate the plan and trust. (PX 7, page XIII-2.) Sommers exercised discretionary authority and discretionary control to the extent of these powers. Walter Corrigan, who together with his secretary and two children constituted all of the members of Sommers' board of directors, exercised the same discretion. (PX 56; Tr. 245-46.) Corrigan acknowledged this power when he appointed himself trustee of the plan effective January 1, 1978. (PX 8, page 1.) He also recognized these powers when he stated: "As you know, the power to terminate the Trust and to make distribution of its assets to the beneficiaries rests exclusively in the board of directors of Sommers, and not in the Trustees." (PX 10, page 3.)

After considering the foregoing law and the facts elicited at trial, the District Court gave the jury the following instructions as to the definition of a fiduciary:

> For purposes of ERISA, a person is a fiduciary with respect to a plan to the extent he exercises any discretionary authority or discretionary control respecting management of the plan or exercises any authority or control respecting management or disposition of its assets. Under ERISA, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan. Whether Walter Corrigan or Corrigan Enterprises, Inc. exercised any authority or control respecting management or disposition of

> the plan's assets, depends, therefore, upon whether either Defendant exercised authority or control over the trustees.

793 F.2d at 1459.

The Court of Appeals held that this instruction did not go far enough in spelling out the nature of the control required before Walter Corrigan and Sommers could be considered fiduciaries.

> First, the District Court should have instructed the jury that the Defendants could be found fiduciaries with respect to the sale of the Trust's stock *only* if they controlled the trustees' decision to sell. Second, the Court should have instructed the jury that it could not infer that the defendants controlled the trustees' decision merely from the defendants' status as the trustees' former employer (in the case of Corrigan Enterprises) or as an officer and director and principal shareholder of the employer (in the case of Walter Corrigan). Nor could the jury infer control merely from the defendants' power to appoint the trustees. To permit an inference of control from these relations alone would vitiate the notion of limited fiduciary responsibility established by the "to the extent" language of ERISA § 3(21)(A). Rather, the District Court should have instructed the jury that it could find the requisite control only if the defendants, either through the use of their positions or otherwise, caused the trustees to relinquish their independent discretion in deciding whether to sell the Trust's stock and to follow instead the course prescribed by the defendants.

793 F.2d at 1460.

The District Court's instructions track the statutory language. The instructions which the Court of Appeals would require depart from the statute, the interpretive decisions, and the regulations. The Court of Appeals would condition the jury's finding that the Defendants were fiduciaries with respect to the

sale of the Trust's stock on a prior finding that they controlled the trustees discretion to sell. If the Defendants were fiduciaries, it was because they exercised discretionary authority and discretionary control. Although they were liable for breach of their fiduciary duty only to the extent they exercised such discretion, if, at the time the Trust sold its stock they exercised *any* such discretion, they were fiduciaries under the statute.

The District Court properly submitted the issues of fiduciary liability as separate issues. (R 220, pages 4-7.) The liability issues submitted properly allowed the jury to find that the Defendants, by exercising discretionary authority and discretionary control with respect to the appointment and removal of the trustees, breached their fiduciary duty under Section 404 by failing to remove the trustees to prevent them from selling the Trust's stock for an inadequate consideration; that the Defendants breached their co-fiduciary duty under Section 405 by failing to take action to prevent the trustees from selling the stock in breach of the fiduciary duty imposed on the trustees; and that the Defendants while serving as fiduciaries engaged in prohibited transactions by taking part in a transaction whereby Sommers, a party in interest, purchased the Trust's stock for an inadequate price.

The instructions of the District Court properly guided the jury in its finding that the Defendants were fiduciaries. Because that finding is supported by irrefutable evidence, it cannot be said that the jury was misled or confused. *Delancey v. Motichek Towing Service, Inc.*, 427 F.2d 897, 901-02 (5th Cir. 1970). Having found that Sommers and Corrigan were fiduciaries, they found that they breached their fiduciary duties, co-fiduciary duties, and engaged in prohibited transactions.

The instruction required by The Court of Appeals is a violent departure from the plain language of the statute. The burden it would impose on ERISA plaintiffs would seriously weaken the enforcement provisions of the statute thereby frustrating Congress' efforts to protect the retirement benefits and welfare benefits of employees.

II.

The Fifth Circuit's holding that punitive damages may not be recovered under Section 502(a)(2) and Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 conflicts with decisions by the Ninth Circuit and presents an important federal question with significant impact on the enforcement of the fiduciary duties imposed by the Employee Retirement Income Security Act of 1974.

This action is brought under ERISA §§ 502(a)(2) and 502(a)(3), 29 U.S.C. §§ 1132(a)(2) and (a)(3). Section 502(a)(2) authorizes plan participants to bring actions for relief under Section 409, 29 U.S.C. § 1109. Section 409 holds plan fiduciaries personally liable for breaches of any of the responsibilities, obligations and duties imposed on them by the statute. The statute also makes them subject to "other remedial or equitable relief." Section 502(a)(3) authorizes participants to bring actions for appropriate equitable relief to enforce the provisions of the statute.

The Court of Appeals attached no significance to the word "remedial" appearing in Section 409. The Court of Appeals relied on the legislative history of ERISA in concluding that Congress intended to limit the relief authorized by the statute to relief cognizable in equity. The holding of the Court of Appeals is in direct conflict with the Ninth Circuit's holdings in *Russell v. Massachusetts Mutual Life Insurance Company*, 722 F.2d 482, 490-92 (9th Cir. 1983), *rev'd*, 473 U.S. ______ (1985); and *Winterrowd v. David Freedman & Co.,Inc.*, 724 F.2d 823, 826 (9th Cir. 1984).

Section 409 authorizes "remedial" relief, a term which includes both legal and equitable remedies. *Black's Law Dictionary* 1163 (5th Ed. 1979).[4] Thus, unless the word remedial is to

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[4] "Remedy" . . .
The rights given to a party by law or by contract which that party may exercise upon a default by the other contracting party, or upon the commission of a wrong (a tort) by another party."

be ignored, extracontractural damages as authorized at law, including punitive damages, are recoverable under Section 409. But even if Congress had ommitted the reference to remedial relief, extracontractural damages are also recoverable in equity.

Before the merger of law and equity, some courts of equity refused to award punitive damages on the theory that their jurisdiction was limited to making the parties whole. Others held that punitive damages were not available at equity because a petitioner waived his right to legal remedies when he initiated an equitable proceeding. Redden, K., *Punitive Damages*, chap. 20 (1980). Since the merger of law and equity, the trend of modern courts it to allow punitive damages in equitable proceedings. D. B. Dobbs, *Handbook of the Law of Remedies*, § 39 (1974). Punitive damages are now available to equity petitioners in New York, California, Texas and numerous other states. *See*, *Punitive Damages*, chap. 20 at note 1 (1980).

The availability of punitive damages in equitable proceedings as a deterrent to proscribed conduct is an essential tool in the administration of justice. Mississippi, a recent convert, has stated:

> From what we have said above, it may be seen that the remedial sanctions of an award of damages is well recognized as part of the public policy of this state. Regrettably, there are individual and corporate citizens acting in this state who behave in such a way that the only appropriate response is a stinging assessment of punitive damages. If this be an appropriate sanction to our law courts, it makes no sense that it should be beyond the power of our Chancery courts.

The Court of Appeals, relying on *The Restatement (Second) of Trusts* (1959), held that punitive damages are not authorized by ERISA. The provisions of the Restatement, published over 27 years ago are not in keeping with modern judicial precedents.

If ERISA fiduciaries were only obligated to repay that which they have unlawfully taken, the statute will certainly fail to

accomplish its intended purpose. Fiduciaries tempted by self interest would weigh the certain benefits accruing from their unlawful conduct against the uncertain possibility that if their actions were detected and challenged, they would be required to pay back that which was not lawfully theirs.[5] That Congress did not intend such a result is apparent from a reading of the floor debate on ERISA. "Instances have arisen in which pension funds have been used improperly by plan managers and fiduciaries .... [T]his bill contains measures designed to reduce substantially the potentialities for abuse." 120 Cong. Rec. 29957 (1974) (Remarks of Sen. Nelson). "These standards ... will prevent abuses ... by those dealing with plans." 120 Cong. Rec. 29206 (1974) (Remarks by Rep. Dent). In forging ERISA's remedies, Congress intended to protect the retirement rights of beneficiaries from fiduciaries who otherwise would be tempted by self interest.

The Court of Appeals, by restricting the availability of ERISA remedies, has obstructed the Congressional purpose. Certiorari should be granted to remove this impediment and to resolve the conflict between the circuits.

III.

The Fifth Circuit's holdings that the testimony of Cross-Petitioner's expert witness was unworthy of credit and that there was insufficient evidence to support the jury's finding of fair market value conflicts with the decisions of this Court.

The Court of Appeals held that the testimony of Dan Hanke, Respondent's expert witness, was not worthy of credit. The Court of Appeals held that Dan Hanke should have considered the factors ennumerated in 26 C.F.R. § 20.2031-2(f)(2) (1985) in arriving at his conclusions. Because the Court of Appeals did not

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[5]Although §501 pemits the assessment of a criminal penalty of $5,000 for willful violations of the statute, that assessment alone is not sufficient to discourage fiduciaries from plundering employee benefit plans whose assets are in the millions of dollars.

believe Mr. Hanke's testimony, it reversed the jury's finding of fair market value.

The credibility of witnesses is the special province of the trier of fact. *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 856 (1982); *Davis v. Alaska*, 415 U.S. 308, 317 (1974). The District Court recognized the jury's responsibility and instructed them accordingly: "You are the sole judges of the credibility or 'believability' of each witness and the weight to be given to his or her testimony." (R 220, p. 2.) As to the jury's role in considering expert testimony, the District Court gave the following instruction: "The opinions of expert witness are also evidence which you should consider. If you should decide that the opinion is not based on sufficient education or experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely." (R 220, p. 2.) Petitioner did not complain about either of these instructions and has not challenged them on appeal.

In holding Dan Hanke's testimony to be unworthy of credit, the Court of Appeals usurped the function of the jury. The Court of Appeals had no authority to review the credibility of witnesses, and in doing so committed error. Had the Court followed the proper standard for appellate review, it would have found that the jury's findings of fair market value were supported by sufficient evidence.

The standard for appellate review as prescribed by this Court is a narrow one:

> Only where there is a complete absence of probative facts to support the conclusion reached [by the jury] does a reversible error appear. But where, as here there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusions. And the appellate courts' function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the Court

> might draw a contrary inference or feel that another conclusion is more reasonable.

Lavender v. Kurn, 327 U.S. 645, 653 (1945).

Special Interrogatory Number 8, which asked the jury to find the fair market value of the Respondent's stock, contained the following instruction:

> "Fair market value" means the cash value which would be placed on the stock by a willing buyer and a willing seller, neither of whom is under any compulsion to buy or sell, and each possessing reasonable knowledge of relevant facts concerning the company to be purchased. In determining fair market value, you may consider the liquidated value of the corporation as of the date of sale of the stock.

R 220, p. 9.

The jury answered that the fair market value of Respondent's stock was $1,146,846. Dan Hanke testified that the asset or liquidation value of Respondent's stock was $1,146,846. (Tr. 795-96.) He also testified that, in his opinion, the liquidation value and the fair market value were the same. (Tr. 803.) Because the jury was instructed that they could consider the liquidation value of Sommers in arriving at their finding, the evidentiary basis for the jury's verdict rests on Hanke's testimony considering asset value *and* on his testimony concerning fair market value. Hanke's testimony was buttressed by James Holmes who testified that the Trust's stock was worth $1,300,000. (Tr. 514.) There being an evidentiary basis for the jury's verdict, the Court of Appeals was prohibited from substituting its view of the facts for that of the jury.

Conclusion

The decision of the Fifth Circuit conflicts with the decisions of the Supreme Court, conflicts with the decisions of the Ninth Circuit, and raises a question of general importance in the enforcement of the fiduciary duties imposed by ERISA. This cross-petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

Charles B. Gorham

CHARLES B. GORHAM
SHADDOX, COMPERE, GORHAM
& GOOD, P.C.
1250 N.E. Loop 410, Suite 725
San Antonio, Texas 78209
(512) 822-2018

COUNSEL OF RECORD FOR CROSS-PETITIONER

CHARLES R. SHADDOX
STEPHEN E. WALRAVEN
SHADDOX, COMPERE, GORHAM
& GOOD, P.C.
1250 N.E. Loop 410, Suite 725
San Antonio, Texas 78209
(512) 822-2018

COUNSEL FOR CROSS-PETITIONER

Certificate of Service

I, Charles B. Gorham, Counsel of Record for Cross-Petitioner, hereby certify that three copies of the Cross-Petition for a Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit with regard to the above-styled and numbered case have been deposited in the United States Mail, with sufficient postage affixed thereto, addressed to Mr. Shannon H. Ratliff, Mr. Marc O. Knisely and Ms. Jill Beckett Cochran, Counsel for Petitioner, on this the 16th day of December, 1986. I further hereby certify that all parties required to be served have been served.

Charles B. Gorham
CHARLES B. GORHAM

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THE SOMMERS DRUG STORES CO. EMPLOYEE PROFIT SHARING TRUST, *Plaintiff-Appellee, Cross-Appellant.* v. CORRIGAN ENTERPRISES, INC. and WALTER N. CORRIGAN, *Defendants-Appellants, Cross-Appellees.*	No. 85-2377 OPINION

Filed July 14, 1986

Before: Homer Thornberry, Henry A. Politz, and Carolyn Dineen Randall, Circuit Judges.

Opinion by Judge Homer Thornberry

Appeals from the United States District Court for the Western District of Texas H. F. Garcia, District Judge, Presiding

SUMMARY

Pensions

Appeal from judgment and award of actual and punitive damages. Reversed and remanded.

This appeal arises from appellants Walter Corrigan and Corrigan Enterprises' (Corrigan) actions in connection with the sale of appellee Sommers Drug Stores Company Employee Profit Sharing Trust's (trust) shares in Sommers Drug Store Company (Sommers). Corrigan was the principal shareholder and an officer in Sommers when the trust accepted an offer to sell its shares. In its capacity as

principal shareholder and officer, Corrigan had the power to appoint trustees on behalf of the trust. The trust filed a complaint alleging that Corrigan breached its fiduciary duty to the trust under ERISA and under common law to disclose material information to the trust. The district court held that the trust's ERISA claim preempted its common law claim and the jury found Corrigan guilty of the breach. The jury awarded actual and punitive damages.

[1] This court will reverse a jury instruction if the charge as a whole leaves a substantial and eradicable doubt whether the jury has been properly guided in its deliberations. **[2]** A person is a fiduciary only with respect to those aspects of the plan over which he exercises authority or control. **[3]** In this case, the trustees had exclusive authority under the terms of the trust to manage, control, sell, exchange or lease the trust's assets. Thus, Corrigan's status as fiduciary with respect to the sale of the trust's stock depends on whether Corrigan controlled the trustees' decision to sell. **[4]** The court should have instructed the jury that it could find the requisite control only if Corrigan, either through the use of its positions or otherwise, caused the trustees to relinquish their independent discretion in deciding whether to sell the trust's stock and to follow instead the course prescribed by Corrigan. **[5]** The jury's fair market value determination must be sustained if, viewing the record as a whole and in the light most favorable to the trust, reasonable jurors could have made the finding that the jurors made in this case. **[6]** Here, the testimony relied upon by the jury was so conclusory and lacking in analysis that no jury could reasonably have relied on it in determining the fair market value of the trust's stock. **[7]** Although ERISA does not define the term fair market value, it is defined in other contexts as the price that a willing buyer would pay a willing seller, both having reasonable knowledge of the pertinent facts. **[8]** Estate tax law provides that closely held stock for which there is no available market price should be valued according to the company's net worth, prospective earning power and dividend-paying capacity and other relevant factors. **[9]** The trust's primary evidence concerning valuation ignored most of these factors. Although this court does not suggest that consideration of these factors would necessarily have changed the valuation of the trust's shares, the utter failure to consider these relevant factors, or to explain disregarding them, renders the evidence unworthy of credit

[10] The Supreme Court recently held that an individual beneficiary cannot recover extracontractual damages, either compensatory or punitive, under ERISA for improper processing of benefit claims. **[11]** The language of the statute, stating that the fiduciary is subject to other equitable or remedial relief as the court may deem appropriate, suggests that punitive damages should not be allowed. Punitive damages do not fall within the broad category of equitable or remedial relief; they are designed to punish the wrongdoer and deter others from similar misconduct. **[12]** The legislative history supports the view that punitive damages are not allowed. Under the law of trusts, trustees generally are not liable for punitive damages for breach of fiduciary duty. **[13]** Congress did not intend to permit plans to recover punitive damages against fiduciaries for breach of their fiduciary duty. **[14]** ERISA shall supercede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan. However, any state law which regulates insurance, banking, or securities is excluded. **[15]** A state law relates to an employee benefit plan if it has a connection with or reference to such a plan. **[16]** If the state law involves an exercise of traditional state authority, then the courts are less likely to find that it relates to a benefit plan than if it involves a state attempt to regulate an area not traditionally left to the states. **[17]** If the state law affects relations among the principal ERISA entities, the courts are more likely to find that it relates to a benefit plan than if it involves relations where one or more of the entities are outside parties with only an incidental effect on the plan. **[18]** This court feels that whether the state law affects relations among the principal ERISA entities more properly bears upon whether a state law is preempted. **[19]** In this case, the state law and ERISA duties are parallel but independent. **[20]** Therefore, the state common law of corporate fiduciary duty, as applied in this case, affects benefit plans in too tenuous, remote, and peripheral a manner to warrant a finding that it relates to the employee benefit plans.

OPINION

HOMER THORNBERRY, Circuit Judge:

The Sommers Drug Stores Company Employee Profit Sharing Trust sued Walter N. Corrigan and Corrigan Enterprises, Inc., in

United States District Court for the Western District of Texas, alleging that the defendants had breached their fiduciary duty to the Trust under ERISA and under state common law. Following a jury verdict in favor of the Trust and a remittitur, the district court entered a judgment awarding the Trust $552,611.87 actual damages and $1,250,000 punitive damages. Corrigan and Corrigan Enterprises appeal, asserting that the district court committed numerous errors. The Trust cross-appeals. We reverse the judgment of the district court and remand for new trial on both liability and damages.

I. BACKGROUND

The Sommers Drug Store Company was incorporated in Delaware in 1947. Until its sale in 1977, the company engaged primarily in the retail pharmaceutical business. Its principal offices were in San Antonio, Texas.

Walter N. Corrigan became president of Sommers and a member of its board of directors in the mid-1950s. At about the same time, Sommers established a pension plan for its employees, consisting of an Employee Profit Sharing Plan and the Employee Profit Sharing Trust. Under the terms of the pension plan agreement as amended in 1976, Sommers, acting through its board of directors, had the power to appoint the plan administrator and the trustees of the Trust. The plan administrator had the power to value the assets held by the Trust. The trustees had the power to "manage, control, sell, exchange or lease" assets held by the Trust "at such prices and upon such terms and conditions as they deem desirable." Sommers retained the power to "suspend or discontinue its contributions under the Plan, and to terminate, at any time, the Trust created under this Agreement." Walter Corrigan served as a trustee of the Trust from its inception until May 27, 1976. He became a trustee again on January 1, 1978.

During the period of his employment at Sommers, Walter Corrigan gradually acquired the company's stock. By 1977 he owned approximately 47% of the outstanding shares. The Trust held about 16% of the outstanding shares. Sommers operated forty drug stores in San Antonio, Austin, and Beaumont, Texas. The company's wholly owned subsidiary, Crockett Realty Company, owned three

tracts of land, the East Houston Street and Gembler Road properties in San Antonio and a coast house in Port Aransas, Texas.

In the early and mid-1970s Sommers' board of directors explored the possibility of merging the company with or selling it to one of several national drug store companies that had expressed interest. These explorations did not bear fruit until 1977, when the board entered into negotiations with Malone & Hyde, Inc., a Tennessee corporation. To facilitate a deal with Malone & Hyde, the board decided to recommend shareholder approval of a reverse stock split, under which 250 shares of $1 par stock would be converted into one share of $250 par stock, with Sommers purchasing fractional shares. The shareholders approved this plan on June 27, 1977. The reverse split reduced the number of shareholders from 66 to 16. Sommers paid $40 per pre-split share for the fractional shares. Following the split, Walter Corrigan held approximately 52% of Sommers' outstanding shares, and the Trust held roughly 20%.

In July 1977 Malone & Hyde reached an agreement with Sommers under which Malone & Hyde would purchase all of Sommers' drug store assets and its trade name. Sommers would remain responsible for its debts. Sommers also would retain ownership of the Crockett Realty Company, which was to lease the East Houston Street property to Malone & Hyde for three years. Malone & Hyde was to hire Walter Corrigan for ten years at $100,000 per year.

The Sommers shareholders, including the Trust, approved the proposed sale in August 1977. The transaction was consummated not long afterward: Sommers received cash in excess of five million dollars and was responsible for debts exceeding two million dollars. Sommers changed its name to Corrigan Enterprises, Inc., in accordance with the agreement to surrender its trade name.

Sometime after the reverse stock split, Walter Corrigan and Sommers/Corrigan Enterprises began offering to buy the stock held by the other fifteen shareholders at $40 per pre-split share, or $10,000 per post-split share. Several shareholders took advantage of this offer. After the sale of Sommers' assets to Malone & Hyde, the Trust's trustees began considering whether to sell the Trust's shares. A debate ensued among the Trust beneficiaries over

whether the offered price was adequate. Ultimately, the trustees decided to accept the offer. The beneficiaries approved this decision at a meeting on December 16, 1977. The sale was consummated on March 6, 1978.

This action was filed in October 1980. The original complaint stated causes of action for securities fraud and breach of fiduciary duty under ERISA. Subsequent amendments added claims for breach of common-law fiduciary duty and for RICO violations. The plaintiffs' fourth amended complaint, filed during trial, dropped all except the ERISA and common-law claims. The common-law claim was amended to allege that the defendants had breached a duty to the Trust to liquidate Corrigan Enterprises and distribute the proceeds pro rata to the shareholders.[1] Both the ERISA and the common-law counts retained the allegation that the defendants had breached a duty to disclose material information to the plaintiffs. The district court held that ERISA preempted the state law claim, and the case was submitted to the jury on the ERISA claim alone.

The jury found that both Walter Corrigan and Corrigan Enterprises had breached their fiduciary duty to the Trust under ERISA. The jury fixed the fair market value of the Trust's stock at \$1,146,846 and assessed punitive damages of \$1,000,000 against Walter Corrigan and \$1,500,000 against Corrigan Enterprises. The district court granted defendants' motion for a remittitur and entered judgment in favor of the Trust for \$552,611.87 actual damages and \$1,250,000 punitive damages, \$500,000 against Walter Corrigan and \$750,000 against Corrigan Enterprises.

On this appeal, we reverse the district court's judgment on liability because of an improper jury instruction, on actual damages because of insufficient evidence, and on punitive damages because under ERISA the Trust may not recover such damages. We discuss the ERISA preemption issue raised by the Trust's cross-appeal to

[1]The appellants contend that the district court abused its discretion in permitting the Trust to add the failure to liquidate theory by mid-trial amendment. Although we find troubling the district court's decision to permit the amendment, we need not consider the issue in light of our disposition of the appellants' other points.

guide the district court on remand. We pretermit consideration of the other issues raised by the parties.

II. DISCUSSION

A. *Jury Instruction on Fiduciary Duty*

[1] The district court instructed the jury as follows on the issue of the appellants' fiduciary duty under ERISA:

> For purposes of ERISA, a person is a fiduciary with respect to a plan to the extent he exercises any discretionary authority or discretionary control respecting management of the plan or exercises any authority or control respecting management or disposition of its assets. Under ERISA the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan. Whether Walter Corrigan or Corrigan Enterprises, Inc. exercised any authority or control respecting management or disposition of the plan's assets, depends, therefore, upon whether either Defendant exercised authority or control over the trustees.

Appellants contend that this instruction permitted the jury to find that Corrigan and Corrigan Enterprises were fiduciaries with respect to the sale of the Trust's stock merely by virtue of their status as, respectively, officer, director, and principal shareholder of Corrigan Enterprises and former employer of the trustees. In reviewing a jury instruction, "we view the charge as a whole, in the context of the entire case, and we ignore technical imperfections .... We will reverse '[if] the charge as a whole leaves us with a substantial and ineradicable doubt whether the jury has been properly guided in its deliberations.'" *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 425 (5th Cir. 1985) (quoting *McCullough v. Beech Aircraft Corp.*, 587 F.2d 754, 759 (5th Cir. 1979)). Applying this standard to the charge before us, we conclude that the district court committed reversible error.

[2] ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1982), states:

> [A] person is a fiduciary with respect to a plan *to the extent* (i) he exercises any discretionary authority or discretion-

ary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. (Emphasis added.)

The phrase "to the extent" indicates that a person is a fiduciary only with respect to those aspects of the plan over which he exercises authority or control. *See Brandt v. Grounds*, 687 F.2d 895, 897 (7th Cir. 1982). For example, if an employer and its board of directors have no power with respect to a plan other than to appoint the plan administrator and the trustees, then their fiduciary duty extends only to those functions. *See Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1325 (9th Cir. 1985); *Leigh v. Engle*, 727 F.2d 113, 133-35 (7th Cir. 1984); 29 C.F.R. § 2509.75-8 D-4 (1985) (Department of Labor interpretation of § 3(21)(A)).

[3] In this case, the trustees had exclusive authority under the terms of the Trust to "manage, control, sell, exchange or lease" the Trust's assets. Corrigan and Corrigan Enterprises were given no such authority, and their authority in other matters did not make them fiduciaries with respect to matters over which they had no authority. Thus, as the district court stated in its instruction, the appellants' status as fiduciaries with respect to the sale of the Trust's stock depends on whether they controlled the trustees' decision to sell.

[4] The instruction did not go far enough, however, in spelling out the nature of the control required before Corrigan and Corrigan Enterprises could be considered fiduciaries. First, the district court should have instructed the jury that the defendants could be found fiduciaries with respect to the sale of the trust's stock *only* if they controlled the trustees' decision to sell. Second, the court should have instructed the jury that it could not infer that the defendants controlled the trustees' decision merely from the defendants' status as the trustees' former employer (in the case of Corrigan Enterprises) or as an officer and director and principal shareholder of the employer (in the case of Walter Corrigan). Nor could the jury infer control merely from the defendants' power to appoint the trustees. To permit an inference of control from these relations alone would vitiate the notion of limited fiduciary responsibility established by

the "to the extent" language in ERISA § 3(21)(A). Rather, the district court should have instructed the jury that it could find the requisite control only if the defendants, either through the use of their positions or otherwise, caused the trustees to relinquish their independent discretion in deciding whether to sell the Trust's stock and to follow instead the course prescribed by the defendants.[2]

In light of the district court's improper instruction on the fiduciary issue, we reverse the district court's judgment of liability on the jury's verdict.

B. *Fair Market Value*

[5] The jury determined that the fair market value of the Trust's stock was $1,146,846, precisely the amount offered by the Trust's expert witness, Dan Hanke. This represents approximately $108.68 per pre-split share, or $27,171.15 per post-split share for each of the Trust's shares. By contrast, the defendants' expert, Dr. Sam Hadaway, concluded that the value per pre-split share was $25 before the Malone & Hyde transaction and $34 afterward. The district court entered judgment for $552,611.87 actual damages, representing the fair market value determined by the jury, less the $400,000 purchase price paid to the Trust by the defendants, less a remittitur for the percentage interest of those beneficiaries who had opted out of the case.

Appellants argue that the evidence was insufficient to support the jury's finding of fair market value.[3] Their principal contention is that Hanke's testimony lacked probative value because his valuation was based on liquidation or asset value rather than fair market value. We must sustain the jury's fair market value determination if, viewing the record as a whole and in the light most favorable to appellees, reasonable jurors could have made the finding that the

[2]The Trust argues on appeal that because Walter Corrigan became a trustee of the Trust on January 1, 1978, and the sale of the Trust's stock was not consummated until March 6, 1978, the jury on that basis could have found him to be a fiduciary with respect to the sale. This theory was not presented to the jury, however, either in the district court's instructions or in counsel's argument. We decline to consider the point for the first time on appeal.

[3]The appellants raised this point in the district court both by motion for directed verdict and by motion for j.n.o.v.

jurors made in this case. *See Carlton v. Shelton*, 722 F.2d 203, 205 (5th Cir.), *cert. denied*, 104 S.Ct. 2389 (1984); *cf. Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc) (applying standard to motions for directed verdict and j.n.o.v.). Because the jury relied so heavily on Hanke's valuation, however, we must examine his testimony carefully to determine if the record supports the jury's finding. *See Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934, 951 (5th Cir. 1975).[4]

[6] Hanke determined Sommers' fair market value by summing the values of all the company's assets,[5] dividing by the total number of outstanding shares,[6] and multiplying the per-share value by 40, the number of post-split shares held by the Trust. Appellants contend that the resulting figure represents the liquidation or asset value of the Trust's shares, but not their fair market value. On cross-examination Hanke acknowledged that market value and

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[4]In addition to Hanke's testimony, the Trust relies on testimony by James Holmes, a member of the Sommers board of directors until the company's sale and a former trustee of the Trust. The extent of Holmes' fair market value testimony is as follows:

> Q Did you know then the trust percentage roughly twenty percent of the assets was much more than $400,000?
>
> A It had been a million three plus.

Tr. 514. This statement, offered without analysis and not even tied to a particular time, has little probative value as to the fair market value of the Trust's stock in December 1977.

[5]Among the assets that Hanke included in his total were the ten year, one million dollar employment contract given by Malone & Hyde to Walter Corrigan and the August 1980 sales price of the East Houston Street property, both discounted to present value as of 1977 or 1978. Appellants contend that the employment contract should not have been included in Corrigan Enterprises' assets and that the East Houston Street property should have been valued according to a 1977 appraisal, which was less than half the 1980 sales price. Because we find Hanke's testimony deficient in other respects, we need not consider these points.

[6]Hanke divided the total asset value of Corrigan Enterprises by 197 outstanding shares of stock to obtain a per-share value. The appellants contend that the actual number of outstanding shares in December 1977 was 209, which, divided into the total assets, would produce a lower per-share value than the number that Hanke used. We need not decide which number is correct; we merely note that the issue is open on remand.

asset value were different measures, but he asserted that in this case they were the same.[7] We conclude that Hanke's testimony was so conclusory and lacking in analysis that no jury could reasonably have relied on it in determining the fair market value of the Trust's stock.

[7] Although ERISA does not define the term "fair market value," it is defined in other contexts as the price that a willing buyer would pay a willing seller, both having reasonable knowledge of the pertinent facts. *See, e.g., United States v. Cartwright*, 411 U.S. 546, 551 (1973) (applying definition in the estate tax context); *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973) (applying definition in takings context); *Klapmeier v. Telecheck International, Inc.*, 482 F.2d 247, 252 (8th Cir. 1973) (applying definition in securities fraud context); *Transwestern Pipeline*

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[7]Hanke's testimony on this point was equivocal. At one point during cross-examination he appeared to concede that he had testified to asset value rather than fair market value:

> Q And the fact of the matter is that you have not testified this morning in the Courtroom to market—fair market value, you testified to asset value when you reached your conclusions? Do you agree with that?
>
> A I agree with that.
>
> . . . .
>
> Q But the fact remains is that your testimony is asset value and not the fair market value.
>
> A All right.
>
> Q Is that correct?
>
> A That is correct.

Tr. 795-96. Later in the cross-examination, however, Hanke seems to have a change of heart:

> Q I thought you told us a while ago that you were not saying that that asset value represented the fair market value of those forty shares?
>
> A Counsel, the approach we took in this evaluation was to approach this as a liquidation in view that there was essentially only two shareholders available and that there was no market for the stock. Under those circumstances, it is my opinion the fair market value is in fact adjusted value when you review the assets.

Tr. 803.

Co. v. O'Brien, 418 F.2d 15, 17 (5th Cir. 1969) (applying definition in takings context). We conclude that this definition is appropriate for purposes of ERISA.

[8] Determining fair market value for the stock of a closely held company can be difficult; typically no readily available market exists in which to determine what willing buyers are prepared to pay. This problem has arisen most frequently in the estate tax context, and it is to that area of law that we turn for guidance. The Internal Revenue Service's estate tax regulations provide that closely held stock for which there is no available market price should be valued according to "the company's net worth, prospective earning power and dividend-paying capacity, and other relevant factors." 26 C.F.R. § 20.2031-2(f)(2) (1985). Among the "other relevant factors" are

> [t]he good will of the business; the economic outlook in the particular industry; the company's position in the industry and its management; the degree of control of the business represented by the block of stock to be valued; and the values of securities of corporations engaged in the same or similar lines of business which are listed on a stock exchange.

Id.; see also Rev. Rul. 59-60, § 4.01, 1959-1 C.B. 237, 238-39 (offering a similar list of factors to be weighed in valuing closely held stock).

[9] Hanke's valuation ignored most of these factors. Of particular significance, he failed to consider that the Trust's stock represented a minority position in Corrigan Enterprises. He also neglected to consider the prices at which shares of comparable companies were traded on the national exchanges. He did not take account of the prices at which Sommers' stock had changed hands in a series of tender offers between 1970 and 1977, one of the factors mentioned in Rev. Rul. 59-60. *See* Rev. Rul. 59-60, § 4.02(g), 1959-1 C.B. 237, 241-42; *See also Fitts' Estate v. Commissioner*, 237 F.2d 729, 731 (8th Cir. 19 56) ("In determining the value of unlisted stocks, actual sales made in reasonable amount at arm's length, in the normal course of business, within a reasonable time before or after the basic date, are the best criterion of market value."); *Duncan Indus-*

tries, Inc. v. Commissioner, 73 T.C. 266, 276 (1979) (same). Nor did Hanke consider whether a discount for lack of marketability should be applied to the Trust's stock. *See Estate of Andrews v. Commissioner,* 79 T.C. 938, 953, 957 (1982).

We do not suggest that consideration of these factors would necessarily have changed Hanke's valuation of the Trust's shares. Indeed, in support of his apparent approach, we note that under Rev. Rul. 59-60, "[t]he value of the stock of a closely held investment or real estate holding company [which Corrigan Enterprises arguably was] . . . is closely related to the value of the assets underlying the stock." Rev. Rul. 59-60, § 5(b), 1959-1 C.B. 237, 243. But Hanke's utter failure to consider other relevant factors, or to explain his reasons for disregarding them, renders his testimony unworthy of credit.

We reverse the district court's judgment of actual damages and remand to the district court for new trial along with the issue of liability.

C. *Punitive Damages*

[10] The district court permitted the jury to award punitive damages against Corrigan and Corrigan Enterprises. The appellants contend that punitive damages may not be awarded under ERISA. The courts of appeals have split on the issue. *Compare Kuntz v. Reese,* 760 F.2d 926, 938 (9th Cir. 1985) (punitive damages available in "appropriate cases" under ERISA § 409(a)), *with Powell v. Chesapeake & Potomac Telephone Co.,* 780 F.2d 419, 424 (4th Cir. 1985) (punitive damages not available under ERISA § 502(a)(3)), *and Dependahl v. Falstaff Brewing Corp.,* 653 F.2d 1208, 1216 (8th Cir.) (dictum that punitive damages not available under ERISA), *cert. denied,* 454 U.S. 968 (1981). The Supreme Court recently held that an individual beneficiary cannot recover extracontractual damages, either compensatory or punitive, under ERISA § 409(a) for improper processing of benefit claims. *See Massachusetts Mutual Life Insurance Co. v. Russell,* 105 S.Ct. 3085, 3094 (1985); *see also Dedeaux v. Pilot Life Insurance Co.,* 770 F.2d 1311, 1313 n.3 (5th Cir. 1985) (citing *Russell* in dictum for proposition that ERISA "neither expressly nor implicitly authorizes" award of punitive damages). The Court expressly left open the two issues with

which we are concerned: (1) whether a plan can recover punitive damages under ERISA § 409(a) against a trustee for breach of fiduciary duty, *see* 105 S.Ct. at 3092 n.12; and (2) whether punitive damages may be recovered under ERISA § 502(a)(3), *see* 105 S.Ct. at 3089 n.5. Because we are unsure under which provision the Trust has proceeded, we examine both issues. Our analysis persuades us that punitive damages are not recoverable under either approach.

[11] *1. ERISA § 409(a).*—ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (1982), permits a civil action to be brought "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under" ERISA § 409. ERISA § 409(a) provides that anyone who breaches a fiduciary duty to a plan

> shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, *and shall be subject to such other equitable or remedial relief as the court may deem appropriate,* including removal of such fiduciary.

ERISA § 409(a), 29 U.S.C. § 1109(a) (1982) (emphasis added). The Supreme Court relied on this provision's emphasis on the plan to deny extracontractual recovery to an individual beneficiary. *See Russell,* 105 S.Ct. at 3089-90. Here any recovery will benefit the plan as a whole, so we must consider whether the phrase "other equitable or remedial relief" includes punitive damages.

The language of the statute suggests that punitive damages should not be allowed. "Equitable or remedial" relief generally includes all of the kinds of relief available to restore the plaintiff's losses or protect him from future harm—recission, *e.g., Gilliam v. Edwards,* 492 F. Supp. 1255, 1267 (D.N.J. 1980), removal of the trustee, *e.g., Katsaros v. Cody,* 744 F.2d 270, 281 (2d Cir.), *cert. denied,* 105 S.Ct. 565 (1984), appointment of a receiver, *e.g., Marshall v. Snyder,* 572 F.2d 894, 901 (2d Cir. 1978), and other similar relief. Punitive damages do not fall within the broad category of "equitable or remedial" relief; rather than restoring the plaintiff's losses and protecting him from future harm, punitive damages are

designed to punish the wrongdoer and deter others from similar misconduct.

[12] The legislative history of ERISA supports the view that punitive damages do not fit within the category of "equitable or remedial" relief. The various committee reports indicate that Congress intended to import into ERISA the fiduciary principles of the law of trusts, adapted as necessary for employee benefit plans. *See* H. Rep. No. 533, 93d Cong., 1st Sess. (1973), *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4649, 4651; S. Rep. No. 127, 93d Cong., 1st Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4865, 4869; 120 Cong. Rec. 29,928, 29,932 (1974) (statement by Sen. Harrison Williams introducing conference report), *reprinted in* 1974 U.S. Code Cong. & Ad. News 5177, 5186. Under the law of trusts, trustees generally are not liable for punitive damages for breach of fiduciary duty. *See, e.g., Powell,* 780 F.2d at 424 (collecting authorities). *But cf. Rivero v. Thomas,* 194 P.2d 533, 542 (Cal. Dist. Ct. App. 1948) (punitive damages permitted against trustee who defrauded beneficiary); *Sharts v. Douglas,* 163 N.E. 109, 112 (Ind. App. 1928) (en banc) (same); *Gould v. Starr,* 558 S.W.2d 755, 771 (Mo. App. 1977) (acknowledging majority rule but permitting punitive damages), *cert. denied,* 436 U.S. 905 (1978). The Restatement (Second) of Trusts supports this view. Section 205 provides:

> If the trustee commits a breach of trust, he is chargeable with
>
> (a) any loss or depreciation in value of the trust estate resulting from the breach of trust; or
>
> (b) any profit made by him through the breach of trust; or
>
> (c) any profit which would have accrued to the trust estate if there had been no breach of trust.

Restatement (Second) of Trusts § 205 (1959); *see also id.* § 206 (providing same remedies for breach of duty of loyalty); 3 A. Scott, The Law of Trusts §§ 205-206 (1967) (recognizing the three measures of recovery in Restatement (Second) § 205). Clauses (a) and

(b) in § 205 correspond to the measures of recovery permitted by ERISA § 409(a), which requires the breaching fiduciary to "make good to such plan any losses to the plan resulting from each such breach" and "to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary." Neither of these clauses permits recovery of punitive damages. Nor does clause (c) of § 205, which has no analogue in ERISA § 409(a), permit punitive damages. Other sections of the *Restatement* apply the principles of § 205 to particular breaches, but none authorizes a different or additional measure of damages. The *Restatement*, therefore, suggests that the law of trusts does not permit punitive damages for breach of fiduciary duty. It follows that ERISA, which incorporates the principles of trust law, does not do so either.

In holding that punitive damages may be awarded under ERISA for actual malice or wanton indifference by a fiduciary, the Ninth Circuit relied on statements in the House and Senate reports that Congress intended to provide " 'the full range of legal and equitable remedies available in both state and federal courts.' " *Russell v. Massachusetts Mutual Life Insurance Co.*, 722 F.2d 482, 491 (9th Cir. 1983) (quoting H. Rep. No. 533 at 17, *reprinted in* 1974 U.S. Code Cong. & Ad. News at 4655; S. Rep. No. 127 at 35, *reprinted in* 1974 U.S. Code Cong. & Ad. News at 4871), *rev'd*, 105 S.Ct. 3085 (1985). As the Supreme Court noted in reversing the Ninth Circuit, however, the committee reports refer to early versions of the bill that ultimately was enacted. These early bills provided for "appropriate relief, legal or equitable, to redress or restrain a breach of any responsibility, obligation, or duty of a fiduciary." H.R. 2, 93d Cong., 2d Sess. § 693 (1974); S. 4, 93d Cong., 1st Sess. § 603 (1973). This provision was rephrased and the word "legal" dropped in the final bill. Thus, we can give little weight to the reports' references to "legal" relief. *See Russell*, 105 S.Ct. at 3092 & n.14.

[13] Our analysis of the language and legislative history of ERISA § 409(a) persuades us that Congress did not intend to permit plans to recover punitive damages under that section against fiduciaries for breach of their fiduciary duty.

2. *ERISA § 502(a)(3)(B).*—An action may be brought under ERISA "by a participant, beneficiary, or fiduciary (A) to enjoin any

act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations . . . ." ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1982). The Supreme Court left open in *Russell* the issue whether this provision permits recovery of extracontractual compensatory or punitive damages. *See* 105 S.Ct. at 3089 n.5. For the reasons discussed at length in the preceding subsection, we conclude that it does not. In brief, the phrase "equitable relief," as it is used in the law of trusts, does not encompass punitive damages. *See Powell*, 780 F.2d at 424.

We hold that the Trust may not recover punitive damages under ERISA § 409(a) or § 502(a)(3). We reverse the judgment entered after remittitur on the jury's verdict awarding punitive damages to the Trust against Corrigan and Corrigan Enterprises.

D. *Preemption*

[14] In the common law fiduciary duty count of its fourth amended complaint, the Trust alleged that "[t]he scheme employed by Corrigan and the Corporation to purchase the shares of minority shareholders, including the Trust, at $40.00 per share . . . violated the fiduciary duties owed by them to the minority shareholders." Fourth Amended Complaint ¶ 19. The Trust also claimed that the defendants breached their fiduciary duty in failing to liquidate the corporation and distribute the proceeds to the shareholders and in actually purchasing the Trust's stock. *Id.* ¶¶ 20-21. The district court held that ERISA preempts the Trust's state law breach of fiduciary duty claims. The Trust complains on cross-appeal that the district court erred.

ERISA § 514(a) provides that "the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." ERISA § 514(a), 29 U.S.C. § 1144(a) (1982). Section 514(c)(1) defines "State law" as "all laws, decisions, rules, regulations, or other State action having the effect of law," a definition broad enough to include state common law. ERISA § 514(c)(1), 29 U.S.C. § 1144(c)(1) (1982). The preemption section includes a savings clause, which excludes from preemption "any law of any State which regulates insurance, banking, or securities." *Id.*

§ 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (1982). *See generally* Kilberg & Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 Texas L. Rev. 1313, 1316-20 (1984) (describing § 514's provisions). The Trust contends that its state law claims do not "relate to" an employee benefit plan and that the common law upon which its claims rest falls within the savings clause as a law regulating securities. Because we find the Trust's first argument dispositive, we do not address its savings clause argument.

[15] The Supreme Court has given the "relate to" phrase in § 514(a) a broad, common-sense construction. *See Metropolitan Life Insurance Co. v. Massachusetts*, 105 S.Ct. 2380, 2389 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97-99 (1983). A state law relates to an employee benefit plan "if it has a connection with or reference to such a plan." *Id.* at 97. Moreover, a state law that does not expressly concern employee benefit plans will still be preempted "insofar as" the law applies to benefit plans in particular cases. ERISA § 514(a); *see Shaw*, 463 U.S. at 97 n.17.

Despite its broad construction of § 514(a), however, the Supreme Court has indicated that it will not extend the "relate to" language to its outer limit. In *Shaw* the Court noted that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Id.* at 100 n.21. The Court cited with apparent approval *American Telephone & Telegraph Co. v. Merry*, 592 F.2d 118, 121 (2d Cir. 1979), in which the Second Circuit held that ERISA did not preempt a state's garnishment of a spouse's benefit plan income to enforce alimony and support orders.[8]

Several courts have employed this analysis in concluding that ERISA does not preempt state laws of general application that indirectly affect benefit plans. In *Lane v. Goren*, 743 F.2d 1337 (9th Cir. 1984), the Ninth Circuit held that ERISA did not preempt a pension plan employee's state law claim that the plan had fired him for reasons of race and age. The court noted that the state antidis-

[8]The Seventh Circuit reached the same result on very similar facts in *Savings & Profit Sharing Fund of Sears Employees v. Gago*, 717 F.2d 1038, 1039-40 (7th Cir. 1983). The court cited *Merry* and *Shaw*'s footnote 21.

crimination law affected the plan "in its role as an employer, and in a way that all other employers are affected." *Id.* at 1340-41. Similarly, the Second Circuit held in *Rebaldo v. Cuomo,* 749 F.2d 133, 137-39 (2d Cir. 1984), *cert. denied,* 105 S.Ct. 2702 (1985), that ERISA did not preempt a state law setting rates that hospitals must charge private payors, including benefit plans. The court rested its holding on two principal considerations. First, it noted that "[t]he containment of hospital costs is an exercise of a State's police powers, which should not be superseded by federal regulations unless that was the clear intent of Congress." *Id.* at 138. Second, the court found that the state law in question affected employee benefit plans only in a " 'tenuous, remote, or peripheral' " manner. *Id.* (quoting *Shaw,* 463 U.S. at 100 n.21). The Second Circuit concluded that when "a State statute of general application does not affect the structure, the administration, or the type of benefits provided by an ERISA plan, the mere fact that the statute has some economic impact on the plan does not require that the statute be invalidated." *Id.* at 139.

The Ninth Circuit relied on *Lane* and *Rebaldo* in holding that ERISA did not preempt a statute authorizing a state labor relations board to order employers who had not bargained in good faith to make their employees whole by paying them the difference between the compensation, including both wages and fringe benefits, that they actually received, and the compensation that they would have received if the employers had bargained in good faith. *Martori Bros. Distributors v. James-Massengale,* 781 F.2d 1356-59 (9th Cir. 1986). The court rejected the employers' argument that the statute was preempted because the fringe benefit portion of the make-whole order required reference to existing benefit plans.

Other courts have rejected arguments that state laws affected benefit plans in too remote, tenuous, or peripheral a manner to warrant preemption. In *Gilbert v. Burlington Industries, Inc.,* 765 F.2d 320, 326-28 (2d Cir. 1985), *appeal filed,* 54 U.S.L.W. 3179 (U.S. Oct. 1, 1985), the court distinguished *Rebaldo* and *Merry* in holding that ERISA preempted a New York statute that made it a misdemeanor not to pay wages or wage supplements due employees. The court found that the employer's severance pay plan was a benefit plan within the meaning of ERISA. *See id.* at 324-26. Turning to the preemption issue, the court noted that "the state law claims

seeking to enforce the severance pay policy would determine whether any benefits are paid, and directly affect the administration of benefits under the plan." *Id.* at 327. Thus, "[a]lthough the regulation of the employment relationship under [the New York statute] is an exercise by the State of its traditional police powers, the state statute does not have such a remote and tenuous connection to Burlington's severance pay plan so as to allow us to conclude that it does not 'relate to' it." *Id.*

The Second Circuit reached a similar conclusion in *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323, 328-29 (2d Cir. 1982), *aff'd mem. sub nom. Arcudi v. Stone & Webster Engineering Corp.*, 103 S.Ct. 3564 (1983). The court held that ERISA preempted a Connecticut workers' compensation statute that required employers to continue pension plan contributions on behalf of injured employers as long as they were eligible to receive workers' compensation benefits. The court distinguished *Merry*, noting that it had dealt with "ancient family law concepts." *Id.* at 329.

Finally, in *Authier v. Ginsburg*, 757 F.2d 796 (6th Cir.), *cert. denied*, 106 S.Ct. 208 (1985), the Sixth Circuit had to decide whether a plan administrator's state common-law cause of action for discharge in violation of public policy based on his alleged compliance with ERISA related to an employee benefit plan. *Id.* at 800. The court concluded that ERISA preempted the administrator's state law wrongful discharge action. The court distinguished *Merry* on several grounds: The cause of action for wrongful discharge is not recognized in every state, while the family law doctrines at issue in *Merry* are; employer-employee relations have not always been the sole concern of the states, while family law matters have; and an ERISA administrator's remedies for wrongful discharge do not involve an exercise of the "basic state police power," while family law matters do. *Id.* at 800 n.6. The court concluded that the state law related to benefit plans because Congress intended ERISA enforcement to be solely a matter of federal concern, and "[a]llowing a fiduciary to bring a state law cause of action for retaliatory discharge . . . will create inconsistency in the enforcement of ERISA." *Id.* at 802.[9]

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[9]The Second and Ninth Circuits have relied in part on ERISA's definition of the term "State" in deciding preemption cases. ERISA § 514(c)(2), 29 U.S.C.

[16] These cases are not easily distilled into a simple test for determining whether a state law of general application affects employee benefit plans in too tenuous, remote, or peripheral a manner to be preempted. The courts appear to consider two principal factors. First, if the state law involves an exercise of traditional state authority, then the courts are less likely to find that it relates to a benefit plan than if it involves a state attempt to regulate an area not traditionally left to the states. *See, e.g., Authier*, 757 F.2d at 800 n.6; *Rebaldo*, 749 F.2d at 138. *But cf. Gilbert*, 765 F.2d at 327 (even exercise of traditional state police power preempted unless it affects benefit plans in a tenuous, remote, or peripheral manner; court treats inquiries as separate).

[17] Second, the courts are more likely to find that a state law relates to a benefit plan if it affects relations among the principal ERISA entities—the employer, the plan, the plan fiduciaries, and the beneficiaries—than if it affects relations between one of these entities and an outside party, or between two outside parties with only an incidental effect on the plan. *Compare Martori Bros.*, 781 F.2d at 1356-59 (state labor statute affecting relations between employer and employee does not relate to plan despite incidental

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§ 1144(c)(2) (1982), provides: "The term 'State' includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." These circuits have suggested that this language may limit ERISA's preemptive effect beyond any limitation implicit in the "relate to" language. *See, e.g., Martori Bros.*, 781 F.2d at 1359; *Rebaldo*, 749 F.2d at 137; *Lane*, 743 F.2d at 1339; *cf.* Kilberg & Inman, *supra*, at 1328-30 (arguing that word "purports" in § 514(c)(2) limits ERISA's preemptive sweep).

The Sixth Circuit has indicated its disapproval of the approach taken by the Second and Ninth Circuits, although it expressly declined to decide whether § 514(c)(2) limits ERISA's preemption provision. *See Authier*, 757 F.2d at 799 n.4. The Sixth Circuit noted that reliance on § 514(c)(2)'s "terms and conditions" language to limit ERISA preemption "would be contrary to the legislative history of ERISA. Congress rejected explicitly a proposed preemption provision which reached only specific subjects covered by ERISA in favor of the current broad language of Section 1144(a)." *Id.*; *see also Shaw*, 463 U.S. at 98-99 & nn.18-20 (describing preemption provision's evolution from narrow conflict of content approach to its broad present form).

We rest our decision in this case solely upon the "relate to" language in § 514(a). We express no opinion on the possible limitations imposed on ERISA preemption by the definition of "State" contained in § 514(c)(2).

effect), *and Rebaldo,* 749 F.2d at 138-39 (state hospital cost statute that affects relations between pension plans and hospitals does not relate to plan despite economic impact), *and Lane,* 743 F.2d at 1340-41 (state antidiscrimination statute that affects relations between pension plan and employee does not relate to plan), *with Metropolitan Life Insurance Co.,* 105 S.Ct. at 2389 (state statute requiring insured plans to provide mental health benefits—thus affecting relations between plan and beneficiaries—relates to plan), *and Shaw,* 463 U.S. at 96-100 (state statute requiring plans to provide benefits for pregnancy-based disabilities relates to plan), *and Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 522-26 (1981) (state statute prohibiting use of workers' compensation benefits to offset pension benefits relates to plan), *and Gilbert,* 765 F.2d at 326-28 (state statute requiring employer to make payments into severance pay benefit plan relates to plan), *and Authier,* 757 F.2d at 799-802 (state wrongful discharge law that affects relations between employer and plan fiduciary relates to plan).

[18] We are not convinced that the first of these two considerations—the traditional or nontraditional nature of the state law—properly bears upon the question whether a state law of general application affects a benefit plan in so tenuous, remote, or peripheral a way that it cannot be said to "relate to" the plan. The distinction finds no support in § 514(a)'s "relate to " language. The most plausible statutory basis is § 514(c)(2), which defines the statutory term "State" as "a State, any political subdivisions thereof, or any agency or instrumentality of either, *which purports to regulate,* directly or indirectly, the terms and conditions" of benefit plans. ERISA § 514(c)(2), 29 U.S.C. § 1144(c)(2) (1982) (emphasis added). A traditional state law of general application arguably may not "purport[] to regulate ... the terms and conditions" of employee benefit plans. As we have noted,[10] however, we rest our decision solely upon the "relate to" language in § 514(a); we do not address the effect of § 514(c)(2).

Our focus, therefore, is upon the second factor that courts have considered, implicitly or explicitly, in construing the "relate to" language—whether the state law affects relations among the principal ERISA entities. At first glance, the state common law of corpo-

[10] *See supra* note 9.

rate fiduciary duty, as applied in this case, appears to do just that. Walter Corrigan is alleged to be a fiduciary of the Sommers Employee Profit Sharing Trust. He is being sued by the Trust and its beneficiaries. Application of the state law would apparently affect relations between the alleged plan fiduciary, the plan, and the plan beneficiaries. Further analysis reveals, however, that the appearance is misleading.

[19] The state common law of fiduciary duty that the Trust seeks to invoke in this case centers upon the relation between corporate director and shareholder. The director's duty arises from his status as director; the law imposes the duty upon him in that capacity only. Similarly, the shareholder's rights against the corporate director arise solely from his status as shareholder. That in a case such as ours the director happens also to be a plan fiduciary and the shareholder a benefit plan has nothing to do with the duty owed by the director to the shareholder. The state law and ERISA duties are parallel but independent: as director, the individual owes a duty, defined by state law, to the corporation's shareholders, including the plan; as fiduciary, the individual owes a duty, defined by ERISA, to the plan and its beneficiaries. Thus, the state law does not affect relations between the ERISA fiduciary and the plan or plan beneficiaries as such; it affects them in their separate capacities as corporate director and shareholder.

It can be argued, however, that although the duties are independent, they will nevertheless saddle the director/fiduciary with inconsistent or conflicting requirements, which in turn will affect his relations as fiduciary with the plan. But we regard this as a remote possibility, at least when, as here, the plan is a shareholder. In most cases, the duty that the director owes to the plan as shareholder will require the same course of conduct as the duty that he owes as fiduciary to the plan under ERISA. Because the ERISA duty—"the highest known to law," *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982)—imposes a standard of care at least as high as that imposed by the director-shareholder duty, the ERISA duty will generally be the director/fiduciary's principal guide in his relations with the shareholder/plan. In the unlikely event that the director's duty to the plan as shareholder conflicts with his duty as fiduciary under ERISA, he might have to resign one position or the other. *Cf. id.* at 276 (for

directors/fiduciaries whose company was faced with a hostile takeover bid, "perhaps . . . resignation [as fiduciaries] was the only proper course"). But this seems to us a remote possibility with only a minimal effect on benefit plans.

Donovan, although not squarely on point, supports our conclusion that the state law as issue in this case does not relate to an employee benefit plan. In *Donovan*, directors and officers of Grumman were faced with a cash tender offer from LTV Corp. The directors and officers were also trustees of the Grumman employee benefit plan, which held a block of Grumman stock. The directors and officers decided after cursory consideration to resist the LTV offer. In their role as trustees, they decided not to tender the benefit plan's shares, but instead to have the plan buy more Grumman stock. The obvious effect of the trustees' decision was to impede the LTV tender offer. The Second Circuit concluded that the district court properly granted a preliminary injunction against the LTV offer on grounds that the trustees had breached their fiduciary duty to the plan under ERISA. The court considered and rejected the contention that because the directors and officers arguably had satisfied their duty to the shareholders to investigate the tender offer, they had necessarily fulfilled their ERISA duties as trustees as well. *See id.* at 272 n.8. That the court would consider this argument indicates its belief that the directors' and officers' state law duty to shareholders could co-exist with their ERISA duties to the benefit plan.

Several recent cases holding that ERISA preempts state law claims under circumstances superficially similar to ours can be distinguished. In *Light v. Blue Cross & Blue Shield of Alabama*, No. 85-4675 (5th Cir. June 4, 1986), this court held that ERISA preempts a plan beneficiary's state law breach of fiduciary duty claim against the plan administrator. The state law claim in *Light*, unlike the one in this case, affected relations between an ERISA plan fiduciary and the plan beneficiaries as such. *Powell v. Chesapeake & Potomac Telephone Co.*, 780 F.2d 419 (4th Cir. 1985), and *Scott v. Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985), are distinguishable on similar grounds. In *Powell*, a former employee of Chesapeake & Potomac and beneficiary of its benefit plan sued C. & P., its parent company A.T. & T., and the plan administrator under ERISA for breach of fiduciary duty and under state law for intentional inflic-

tion of emotional distress, breach of covenant of good faith and fair dealing, breach of contract, and unfair trade practices. The plaintiff alleged that the defendants had harassed her in various ways when she sought disability benefits under the plan. These state law claims, like those in *Light*, affected relations between the employer, the plan fiduciaries, and the plan beneficiaries. The court found the claims preempted by ERISA. *See Powell*, 780 F.2d at 421-22. In *Scott*, the Ninth Circuit concluded that plan beneficiaries' state law claims against their employer were preempted to the extent that "the conduct challenged by each claim was part of the administration of an employee benefit plan." *Scott*, 754 F.2d at 1505.[11]

[20] We conclude that the state common law of corporate fiduciary duty, as applied in this case, affects benefit plans in too tenuous, remote, and peripheral a manner to warrant a finding that it "relate[s] to" the plans. The state law is a law of general application; it imposes a duty on all corporate directors, whether or not they are plan fiduciaries, and it runs in favor of all shareholders, including benefit plans. It does not affect relations among the principal ERISA entities—the employer, the plan fiduciaries, the plan, and the beneficiaries—as such, but only in their independent capacities as corporate director and shareholder. In prescribing standards of conduct for corporate directors, the state law will rarely if ever impose conflicting or inconsistent duties on directors who are also

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[11] *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091 (9th Cir. 1985), cited by Corrigan, is also distinguishable. Ellenburg, an employee of Brockway and beneficiary of its benefit plan, sued under ERISA and under state law to recover early retirement benefits that he claimed had been wrongfully withheld. Among his state law claims, Ellenburg asserted that Brockway and Cunningham, Brockway's director of personnel, had breached their implied covenant of good faith and fair dealing. The court held that ERISA preempted this claim, noting that the claim "is brought against Brockway and Cunningham in their capacity as employer, rather than fiduciaries, and seemingly concerns the employment relationship. However, this claim originates from the handling and disposition of Ellenburg's claim for early retirement benefits and is therefore directly connected with the employee benefit plan . . . ." *Id.* at 1095.

The state law claim in *Ellenburg* arose directly out of the internal operations of the plan. The claim affected relations among the employer, the plan, and the plan beneficiary, notwithstanding its ostensible basis in the employer-employee relationship. The state law claim in this case, by contrast, arises solely from the director-shareholder relationship and involves the plan only through the fortuitous circumstance that the director is a fiduciary and the shareholder a plan.

plan fiduciaries. We hold, therefore, that ERISA does not preempt the cross-appellant's state law claims. On remand, the Trust may proceed with those claims.

III. CONCLUSION

We hold that the district court erred in instructing the jury on the circumstances under which Corrigan and Corrigan Enterprises could be found to be fiduciaries with respect to the sale of the Trust's stock. We hold further that there is insufficient evidence in the record to support the jury's finding of fair market value, upon which the district court's judgment of actual damages was based. We hold that the Trust cannot recover punitive damages under either ERISA § 409(a) or ERISA § 502(a)(3). Finally, we hold that ERISA does not preempt the state law breach of fiduciary duty claims asserted in the Trust's fourth amended complaint. The judgment of the district court is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-2377

D.C. Docket No. SA-83-CA-560

THE SOMMERS DRUG STORES COMPANY
EMPLOYEE PROFIT SHARING TRUST,

Plaintiff-Appellee
Cross-Appellant,

versus

CORRIGAN ENTERPRISES, INC. and
WALTER N. CORRIGAN,

Defendants-Appellants
Cross-Appellees.

Appeals from the United States District Court for the
Western District of Texas

Before THORNBERRY, POLITZ, and RANDALL,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is

remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiff-appellee twenty-five percent of the costs on appeal and that plaintiff-appellee pay to defendants-appellants seventy-five percent of the costs on appeal, to be taxed by the Clerk of this Court.

July 14, 1986

ISSUED AS MANDATE:

AUG 28 1986 A true copy 8/28/86

Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit
By [signature] Deputy
New Orleans, Louisiana

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OP-JDT-9B Rev. 4/85

U.S. COURT OF APPEALS
FILED

AUG 18 1986

GILBERT F. GANUCHEAU
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-2377

THE SOMMERS DRUG STORES COMPANY
EMPLOYEE PROFIT SHARING TRUST,

Plaintiff-Appellee
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Appeals from the United States District Court for the Western District of Texas

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ON PETITIONS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 14, 1986, 5 Cir., 198__, __________F.2d______)

(AUGUST 18, 1986)

Before THORNBERRY, POLITZ, and RANDALL, Circuit Judges.

PER CURIAM:

(√) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it. (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it. rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Henry A. Politz

United States Circuit Judge REGH-7